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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,)	No. 3 - 07 - 70312 EDL
)	
12 Plaintiff,)	DEFENDANT KANG'S PRE-HEARING
)	MEMORANDUM RE: DETENTION
13 vs.)	HEARING PROCEDURE, AND
)	MOTION TO DISMISS FOR LACK OF
14 EDWARD KANG,)	PROBABLE CAUSE
)	
15 Defendant.)	
)	

16
17 **Introduction**

18 This case involves an alleged conspiracy to commit bank robbery. Mr. Kang initially
19 appeared on May 31, 2007, and the Government asked for the defendant's detention. The matter
20 was set for a hearing on June 7, 2007, before Magistrate Judge Zimmerman. At the initial
21 appearance, counsel for Mr. Kang lodged an objection to the Government proceeding by way of
22 proffer at the detention hearing scheduled before Judge Zimmerman. This motion further sets
23 forth the legal grounds for that objection. In essence, the defendant contends that the use of
24 proffers violates both the Sixth Amendment and the Due Process Clause.
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1 **A. Hearing Procedures Under the Bail Reform Act of 1984**

2 The Bail Reform Act of 1984, codified in 18 U.S.C. § 3142, greatly expanded the power
 3 of the Government to hold defendants in pretrial detention. Prior to the passage of the Act, bail
 4 served the sole purpose of preventing flight. *See* Joseph L. Lester, Presumed Innocent, Feared
 5 Dangerous: the Eighth Amendment's Right to Bail, 32 N. Ky. L. Rev. 1, 38 (2005). In passing
 6 the Bail Reform Act, Congress intended to "give the courts adequate authority to make release
 7 decisions that give appropriate recognition to the danger a person may pose to others if released."
 8 *United States v. Salerno*, 481 U.S. 739, 742 (1987) (quoting S. Rep. No. 98-225, at 3 (1983),
 9 reprinted in 1984 U.S.S.C.A.N. 3182, 3189). Thus, a court determining whether to release a
 10 defendant on bail must now consider not only whether release conditions will "reasonably assure
 11 the appearance of the person," but also whether pretrial release will "endanger the safety of any
 12 other person or the community." 18 U.S.C. § 3142(b).

13 In order to detain a defendant before trial, a court "shall hold a hearing to determine
 14 whether any condition or combination of conditions . . . will reasonably assure the appearance of
 15 such person as required and the safety of any other person and the community." 18 U.S.C. §
 16 3142(f). The detention hearing procedure places the burden of proof on the prosecution and
 17 affords the defendant certain basic rights, but it does not provide the entire array of procedural
 18 safeguards available at trial:

19 At the hearing, such person has the right to be represented by counsel, and, if financially
 20 unable to obtain adequate representation, to have counsel appointed. The person shall be
 21 afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who
 22 appear at the hearing, and to present information by proffer or otherwise. The rules
 23 concerning admissibility of evidence in criminal trials do not apply to the presentation
 and consideration of information at the hearing. The facts the judicial officer uses to
 support a finding . . . that no condition or combination of conditions will reasonably
 assure the safety of any other person and the community shall be supported by clear and
 convincing evidence.

24 *Id.* Thus, while the defendant has the right to cross examine adverse witnesses who appear at the
 25 hearing, the language of the Act does not address the question of whether the defendant has the
 26

1 right to confront those witnesses the government does not call upon to testify. *See id.* In
 2 addition, while it specifically allows a *defendant* to present evidence by way of proffer, the Act is
 3 “silent upon the question whether the *Government* may do so.” *United States v. Smith*, 79 F.3d
 4 1208, 1210 (D.C. Cir. 1996) (emphasis added).

5 Nevertheless, courts which were called upon early in the Act’s history to interpret
 6 whether the Government could proceed by way of proffer held that the Government could do so.
 7 *See id.* *See also United States v. Gaviria*, 838 F.2d 667 (11th Cir. 1987); *United States v. Martir*,
 8 782 F.2d 1141 (2d Cir. 1986); *United States v. Winsor*, 785 F.2d 755 (9th Cir. 1986); *United*
 9 *States v. Acevedo-Ramos*, 755 F.2d 203 (1st Cir. 1985). In reaching this conclusion, the courts
 10 did not look to the plain text of the Bail Reform Act, but relied on the Act’s history, noting that
 11 “the Government regularly proceeded by way of proffer under the District of Columbia bail
 12 statute that served as the model for the Act. That it could continue to do so under the nationwide
 13 Act literally goes without saying.” *Smith*, 79 F.3d at 1210 (internal citations omitted).

14 In addition, several courts, including the Ninth Circuit, interpreted the Bail Reform Act so
 15 as to deny a defendant an absolute right, at least under the Due Process Clause, to confront and
 16 cross-examine witnesses whom the government has not called to testify. *See Winsor*, 785 F.2d at
 17 756; *United States v. Delker*, 757 F.2d 1390 (3d Cir. 1985); *Smith*, 79 F.3d at 1210. The
 18 defendants in these cases argued that due process mandates a right to confront adverse witnesses
 19 in detention hearings. *Winsor*, 785 F.2d at 756; *Smith*, 79 F.3d at 1210. The courts rejected
 20 these due process challenges by pointing to the limited purpose of detention hearings:

21 A pretrial detention hearing, however, is neither a discovery device for the defense nor a
 22 trial on the merits. The process that is due is only that which is required by and
 23 proportionate to the purpose of the proceeding. That purpose includes neither a reprise of
 all the evidence presented before the grand jury, nor the right to confront non-testifying
 government witnesses.

24 *Smith*, 79 F.3d at 1210 (internal citations omitted). Similarly, the Court in *Winsor* rejected an
 25 argument that “due process requires that a defendant in a pretrial detention hearing be afforded
 26 rights of confrontation and cross-examination.” 785 F.2d at 756.

Although decisions such as *Smith* and *Winsor* appear to limit procedural safeguards under the Bail Reform Act, they do not bar the application of the Sixth Amendment's Confrontation Clause to detention hearings. First, these decisions came in response to due process challenges and did not address the issue of whether the Sixth Amendment applies in detention hearings.¹ Courts have recognized the distinction between a right to confrontation that emanates from the Due Process Clauses of the Fifth and Fourteenth Amendments and the Sixth Amendment's Confrontation Clause. See *United States v. Barraza*, 318 F. Supp.2d 1031, 1033 (S.D. Cal. 2004) ("[T]he right to confrontation in a supervised release revocation hearing is a due process, not a Sixth Amendment, right."). Thus, decisions that limit the *due process* right to confrontation in pre-trial detention hearings have little bearing on the question of whether the *Sixth Amendment* right to confrontation applies.

In addition, the *Smith* and *Winsor* line of cases preceded the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) – a case which announced a "watershed rule" that revolutionized Confrontation Clause jurisprudence. See *Bockting v. Bayer*, 399 F.3d 1010, 1019 (9th Cir. 2005) ("The difference between pre- and post-*Crawford* Confrontation Clause jurisprudence is not the sort of change that can be dismissed as merely incremental. Instead, it is an absolute pre-requisite to fundamental fairness."). Because *Crawford* fundamentally changed the role of the Confrontation Clause in criminal prosecutions, the application of the right to confrontation in detention hearings must be re-examined in light of this decision.

B. The Supreme Court's Decision in *Crawford v. Washington*

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Until recently, Confrontation Clause jurisprudence was governed

¹ Although the defendant in *Smith* cited the Confrontation Clause as well as the Due Process Clause in making his claim, the Court's opinion never addressed his Sixth Amendment argument, focusing instead on the due process challenge. See 79 F.3d at 1210.

1 by *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), which admitted hearsay statements where the
2 declarants were unavailable and the statements bore adequate “indicia of reliability.” Such
3 reliability was inferred where the evidence fell within a “firmly rooted hearsay exception.” *Id.*

4 In *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004), however, the Supreme Court
5 abandoned the *Roberts* reliability test insofar as it applied to testimonial evidence. Following a
6 thorough historical analysis of the right to confront adverse witnesses, the *Crawford* Court found
7 that the “the principal evil at which the Confrontation Clause was directed was the civil-law
8 mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against
9 the accused.” *Id.* at 50. The *Roberts* test failed to accomplish the purposes of the Confrontation
10 Clause because it of its unpredictability and its “demonstrated capacity to admit core testimonial
11 statements that the Confrontation Clause plainly meant to exclude,” such as “accomplice
12 confessions.” *Id.* at 63-64. Instead of focusing on reliability and “firmly rooted hearsay
13 exceptions,” the Court in *Crawford* held that “the Framers would not have allowed admission of
14 *testimonial* statements of a witness who did not appear at trial unless he was unavailable to
15 testify, and the defendant had had a prior opportunity for cross-examination.” *Id.* at 53-54
16 (emphasis added). Although the Court did not “spell out a comprehensive definition of
17 ‘testimonial,’” the term applies “at a minimum to prior testimony at a preliminary hearing, before
18 a grand jury, or at a former trial; and to police interrogations.” *Id.* at 68.

19 In this district, the Government almost exclusively proceeds at a detention hearing by way
20 of proffer, which is simply another way of saying that it introduces rank hearsay without any
21 attempt to show that the hearsay satisfies a hearsay exception. Even under the old *Roberts* test,
22 this use of hearsay arguably would be inappropriate – but certainly under *Crawford* the
23 introduction of this hearsay is improper if in fact the Sixth Amendment right to confrontation
24 applies at a detention hearing.

25 The Supreme Court in *Crawford* did not address the question of whether the Sixth
26 Amendment right to confront adverse witnesses applies outside of the trial setting. The language

1 of the Sixth Amendment itself, however, states that the right exists in all “criminal prosecutions,”
 2 a phrase which encompasses more than the trial itself. *See* U.S. Const. amend. VI.; *Cf. United*
 3 *States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004) (Sixth Amendment right to public trial
 4 applies to bail hearings). In addition, several passages of the Constitution refer to “trials” as
 5 distinct from “criminal prosecutions.” *See, e.g.* U.S. Const. art. III, § 2, cl. 3 (“The *trial* of all
 6 Crimes, except in Cases of Impeachment, shall be by jury.”); U.S. Const. amend. VI (“In all
 7 criminal *prosecutions*, the accused shall enjoy the right to a speedy and public *trial*.”); U.S.
 8 Const. amend VII (“[T]he right to *trial* by jury shall be preserved.”) (emphasis added). This
 9 shows that the Framers did not intend to use the terms “trial” and “criminal prosecution”
 10 interchangeably. “Indeed, the Sixth Amendment’s opening phrase, ‘in all criminal prosecutions,’
 11 seems calculated to reach conduct before and beyond the time and place of a criminal trial.”
 12 John C. Douglass, *Admissibility as Cause and Effect: Considering Affirmative Rights Under the*
 13 *Confrontation Clause*, 21 QLR 1047, 1065-66 (2003). Thus, the Sixth Amendment’s
 14 Confrontation Clause protects the rights of defendants not only at the trial, but also at all other
 15 stages of the “criminal prosecution,” including pretrial detention hearings under the Bail Reform
 16 Act.² Accordingly, the rules set forth in *Crawford* should apply in detention hearings.

17 The Second Circuit’s decision in *United States v. Abuhamra*, 389 F.3d 309 (2d Cir.
 18 2004), is instructive in that regard. There, the court was confronted with the issue whether the
 19 Government could proceed in a detention hearing by way of *ex parte* submissions. When
 20 examining the propriety of such submissions, the court discussed both the applicability of the

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 22 ² In *Pennsylvania v. Ritchie*, the Supreme Court stated that “the right to confrontation is a
 23 *trial* right, designed to prevent improper restriction son the types of questions that defense
 24 counsel may ask during cross-examination.” 480 U.S. 39, 52 (1987) (emphasis in original). This
 25 statement does not suggest, however, that the Confrontation Clause has no applicability in
 26 pretrial proceedings. Rather, the Court in *Ritchie* was merely pointing out that the Confrontation
 Clause is not a “constitutionally compelled rule of pretrial discovery,” and that it did not entitle a
 defendant to examine a Children and Youth Services file in order to obtain information that
 would make cross-examination more effective. *Id.* *Ritchie* did not address the question of
 whether the defendant has a right to cross-examine adverse witnesses in pretrial hearings.

1 Due Process Clause and the Sixth Amendment to detention hearings – and found that both
2 applied equally to bail hearings. With regard to the latter amendment, the court recognized that
3 the Sixth Amendment’s guarantee of a public trial on its face only applied to *trials*, but noted that
4 the Supreme Court had nonetheless construed this right expansively to include jury selection, *see*
5 *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984); suppression hearings,
6 *see Waller v. Georgia*, 467 U.S. 39 (1984); and pre-indictment probable cause hearings, *Press*
7 *Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). In light of this authority, the Second
8 Circuit had no problem extending the right to a public trial guaranteed by the Sixth Amendment
9 to bail hearings. *Abuhamra*, 389 F.3d at 323 (“Bail hearings fit comfortably within the sphere of
10 adversarial proceedings closely related to trial”). If the right to a public trial contained in the
11 Sixth Amendment is applicable to a detention hearing, there is no reason to conclude that any of
12 the other rights contained in the Sixth Amendment, such as the right to confront adverse
13 witnesses, does not extend to bail hearings as well.

14 In fact, the argument in favor of extending the Sixth Amendment’s right to confront
15 adverse witnesses to bail hearings is even stronger than are the arguments in favor of extending
16 the right to a public trial to such hearings. While the Sixth Amendment refers to the right to
17 public *trials*, the right to confront adverse witnesses applies to criminal *prosecutions*. If the
18 former right extends to bail hearings, then certainly the latter right does as well. In addition, the
19 entire thrust of the *Crawford* case related to the dangers of having hearsay, and even hearsay
20 which would otherwise come in under a well-established hearsay exception, from being
21 introduced against a defendant at trial. At a detention hearing, a defendant usually has not been
22 indicted and has fewer of the procedural rights available than does a defendant whose case has
23 proceeded through the system all the way to trial. Yet the detention hearing can result in exactly
24 the same harm so strenuously condemned by the *Crawford* court – the danger of having a
25 defendant’s liberty taken from him or her on the basis of unreliable and untested evidence.
26 Clearly, the right to confront witnesses should be extended to bail hearings.

1 The Government has argued in other cases that the right to confront adverse witnesses
2 under the Sixth Amendment does not apply to detention hearings because detention hearings are
3 “regulatory” in nature, and are not “penal” proceedings. This claim is misplaced.

4 The Sixth Amendment makes no distinction between “regulatory” or “penal”
5 proceedings; it refers to criminal prosecutions. It is certainly true that in response to claims that
6 the Bail Reform Act violated the Eighth Amendment’s prohibition against cruel and unusual
7 punishment, courts have held that the pretrial detention is not punishment; it does not follow, and
8 certainly no court has held, that a bail hearing is not part of the criminal prosecution. Indeed, to
9 the extent that the Government has argued that a bail hearing is some form of ancillary civil
10 proceeding not directly involved in the criminal prosecution, that suggestion is belied by the fact
11 that all of the rules and statutes governing detention hearings are contained in the criminal rules
12 and codes. Thus, there is no civil rule or statute which allows for the detention of a defendant. If
13 the Government is legally able to obtain the detention of the defendant under some authority
14 contained in the rules regarding civil matters, it should identify those rules to this Court. There
15 are no such rules, and it is frivolous to assert that a bail hearing is in fact a civil matter separate
16 from the criminal prosecution itself.

17 But if the Government is correct in this claim, the defendant would be happy to have the
18 Court construe detention hearings as civil matters. As such, the defendant would then be free to
19 depose any potential witnesses prior to the detention hearing and to seek other discovery allowed
20 for under the civil rules of procedure. *See* Fed. R. Civ. P. 26.

21 There is no real issue that detention hearings are part of the criminal proceedings brought
22 against a defendant where the Sixth Amendment should apply.

23 ***C. Crawford As Applied To Parole Revocation Proceedings***

24 As is discussed above, the federal courts have not directly addressed the question whether
25 the *Crawford* decision applies to pretrial detention hearings. Nevertheless, lower court decisions
26 in the somewhat related area of parole and probation revocation hearings show that the question

1 about whether *Crawford* extends to these forms of hearings is unsettled. Compare *United States*
2 *v. Hall*, 419 F.3d 980 (9th Cir. 2005) (holding that *Crawford* does not apply to the admission of
3 hearsay evidence during revocation of supervised release proceedings) with *Ash v. Reilly*, 354 F.
4 Supp. 2d 1 (D.D.C. 2004) (holding that *Crawford* is binding precedent for parole revocation
5 hearings). These cases are worthy of analysis.

6 Parole revocation proceedings are similar to detention hearings in that neither are part of
7 the trial itself. Unlike detention hearings, however, “the revocation of parole is *not part of the*
8 *criminal prosecution*,” and thus the full panoply of rights due a defendant in such proceeding
9 does not apply to parole revocations. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (emphasis
10 added). On the other hand, the defendant in a detention hearing, who has not yet been convicted
11 and is *presumed innocent*, obviously enjoys a stronger right to confront adverse witnesses than
12 the a parolee who has already suffered a conviction. See *Herrera v. Collins*, 506 U.S. 390, 398
13 (1993) (“A person when first charged with a crime is entitled to a presumption of innocence
14 Other constitutional provisions also have the effect of ensuring against the risk of convicting an
15 innocent person.”).

16 In *Ash v. Reilly*, the court held that a defendant in a parole revocation hearing has a Sixth
17 Amendment right to confront adverse witnesses. 453 F. Supp. 2d 1, 7 (D.D.C. 2004). The
18 defendant recognizes that several federal courts, including the Ninth Circuit, have disagreed with
19 *Ash*. See, e.g. *United States v. Hall*, 419 F.3d 980 (9th Cir. 2005); *United States v. Kirby*, 418
20 F.3d 621 (6th Cir. 2005); *United States v. Martin*, 382 F.3d 840 (8th Cir. 2004); *United States v.*
21 *Aspinall*, 389 F.3d 332 (2d Cir. 2004), *abrogation on other grounds recognized by United States*
22 *v. Fleming*, 397 F.3d 95 (2d Cir. 2005). However, what is crucial for purposes of this
23 memorandum is the fact that the Ninth Circuit in *Hall* recognized that the Sixth Amendment
24 applies in “criminal prosecutions,” and denied Hall’s request that he be allowed to confront
25 adverse witnesses as a matter of right *only* because supervised release revocation hearings, like
26 parole and probation revocation hearings, are not part of the “criminal prosecution.”

1 Because “[r]evocation deprives an individual, not of the absolute liberty to which every
 2 citizen is entitled, but only of the conditional liberty properly dependent on observance of
 3 special parole restrictions” the full protection provided to criminal defendants, including
 4 the Sixth Amendment right to confrontation, does not apply to them. Rather, a due
 5 process standard is used to determine whether hearsay evidence admitted during
 6 revocation proceedings violates a defendant’s rights.

7 419 F.3d at 985 (internal citations omitted).

8 Therefore, under *Hall*, defendants in detention hearings have a claim of entitlement to the
 9 Sixth Amendment confrontation right because detention hearings *are* part of the criminal
 10 prosecution. *See* discussion *supra*. *See also, e.g., In re Washington Post Co.*, 807 F.2d 383, 389
 11 (4th Cir. 1986) (“Moreover, even if plea hearings and sentencing hearings are not considered a
 12 part of the trial itself, they are surely as much *an integral part of a criminal prosecution* as are . .
 13 . *bail hearings*.”) (emphasis added). *See also United States v. Baucum*, 2001 WL 1448604 at 2
 14 (D. Ariz. 2001) (“No one can seriously contend that a detention hearing is not a critical stage of a
 15 prosecution where the liberty of a defendant hangs in the balance.”). Thus, detention hearings
 16 fall within the ambit of the Sixth Amendment’s Confrontation Clause, even if proceedings to
 17 revoke parole, probation or supervised release do not.

18 **D. The Sixth Amendment Right to Confrontation, as Interpreted in *Crawford***
 19 ***v. Washington*, Must Apply in Detention Hearings Under the Bail Reform Act.**

20 As discussed above, pretrial detention hearings under the Bail Reform Act are part of the
 21 “criminal prosecution,” and defendants in such hearings, therefore, enjoy the protection of the
 22 Sixth Amendment. Moreover, the significant liberty interests at stake in detention hearings, as
 23 well as the time-honored presumption of innocence, require that defendants in detention hearings
 24 be given the right to cross-examine all adverse witnesses as a matter of policy.

25 The Supreme Court has stated that “[a] person when first charged with a crime is entitled
 26 to the presumption of innocence.” *Herrera v. Collins*, 506 U.S. 390, 398 (1993). The
 presumption of innocence plays a particularly important role during pretrial detention hearings
 because of their potential to influence the outcome of a trial:

Jurors may speculate that the accused’s pretrial incarceration, although often

1 the result of his inability to raise bail, is explained by the fact that he poses a
 2 danger to the community or has a prior criminal record; a significant danger
 is thus created of corruption of the fact finding process through mere suspicion.

3 *Estelle v. Williams*, 425 U.S. 501, 518 (1975). In addition, pretrial detention imposes immense
 4 burdens on presumptively innocent defendants – burdens that the courts do not impose lightly:

5 The time spent in jail awaiting trial has a detrimental impact on the individual.
 It often means loss of a job; it disrupts family life; and it enforces idleness.
 6 Most jails offer little or no recreational or rehabilitative programs. The time
 spent in jail is simply dead time. Moreover, if a defendant is locked up, he is
 7 hindered in his ability to gather evidence, contact witnesses, or otherwise prepare
 his defense. Imposing those consequences on anyone who has not yet been
 8 convicted is serious. It is especially unfortunate to impose them on those
 persons who are ultimately found to be innocent.

9 *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972). Indeed, the gravity of pretrial detention has led
 10 some commentators to argue that “[t]he defendant’s liberty is at stake at a bail hearing much as it
 11 is at trial.” Joseph L. Lester, Presumed Innocent, Feared Dangerous: the Eighth Amendment’s
 12 Right to Bail, 32 N. Ky. L. Rev. 1, 45 (2005).

13 Consequences of such magnitude necessitate strong procedural safeguards in pretrial
 14 detention hearings, and the right to cross-examine adverse witnesses is essential to procedural
 15 fairness. The Supreme Court has stated that “[t]he Confrontation Clause provides two types of
 16 protections for a criminal defendant: the right physically to face those who testify against him,
 17 and the right to cross examination.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (citing
 18 *Delaware v. Fensterer*, 474 U.S. 15, 18-19 (1985)). Cross-examination has been described as
 19 “the greatest legal engine ever invented for the discovery of truth.” *California v. Green*, 399
 20 U.S. 149, 158 (1970). It offers a defendant the “the opportunity to show that a witness is biased,
 21 or the testimony is exaggerated or unbelievable.” *Ritchie*, 480 U.S. at 51-52. As the Supreme
 22 Court put it, “this type of evidence can make the difference between conviction and acquittal.”
 23 *Id.* at 52. Without the right to confront adverse witnesses, the detention hearing process allows
 24 the incarceration of presumptively innocent defendants based on evidence whose veracity and
 25 reliability have not been tested “in the crucible of cross-examination.” *Crawford*, 541 U.S. at 62.
 26

1 Thus, defendants facing pretrial detention under the Bail Reform Acts must have the right to
2 confront and cross-examine all adverse witnesses, regardless of whether the government intends
3 to call them to the stand.

4 **III. At The Least, Mr. Kang Has The Right To Confront Adverse Witnesses in**
5 **Detention Hearings Under The Due Process Clause**

6 Even if this Court were to conclude that a bail hearing is not part of a criminal
7 prosecution where the Sixth Amendment right of confrontation applies, Mr. Kang would
8 nonetheless be entitled to confront adverse witnesses under the Due Process Clause.

9 Mr. Kang recognizes that the Ninth Circuit, soon after the Bail Reform Act was passed,
10 held that the defendant had no absolute due process right to confront adverse witnesses at a
11 detention hearing. *United States v. Winsor*, 785 F.2d 755 (9th Cir. 1986). However, if *Winsor* is
12 read to prohibit a defendant from ever having the right to challenge a Government proffer by
13 insisting that the witness be ordered to appear for cross-examination, the right to cross-examine
14 witnesses contained in the Bail Reform Act would be meaningless because the Government
15 could proceed in all cases by way of proffer only. It can be argued, then, that Congress's
16 codification of the right of cross-examination reflects its recognition that there will be times that
17 in order to assure the integrity (and thus the constitutionality) of a bail hearing, due process
18 concerns require the production of certain witnesses. Indeed, some courts have held that when
19 fundamental fairness so requires, a court may order the Government to call witnesses for cross-
20 examination at a detention hearing. *See, e.g. United States v. Hammond*, 44 F. Supp. 2d 743 (D.
21 Md. 1999).

22 In *Hammond*, the Government proffered a police report, rather than calling the officers
23 themselves, to support an allegation that the defendant had violated 18 U.S.C. § 922(g)(1).
24 *Hammond*, 44 F.Supp.2d at 744-45. The police report alleged that the officers had been
25 attempting to arrest the defendant when he ran from them, removed a gun from his waistband,
26 and dropped it. *Id.* The court held that:

1 [W]hen the evidence proffered is the uncorroborated statement(s) of one or two police
 2 officers who allegedly observed a single act committed by the defendant, and where there
 3 is no other evidence offered in support of the eyewitness testimony, the Court should
 4 consider the proffer with great care and accord it limited weight [T]he judicial
 officer should require the government to present live testimony able to withstand
 confrontation, long- and well-recognized as the “greatest legal engine ever invented for
 the discovery of truth.”

5 *Id.* at 746 (citing *California v. Green*, 399 U.S. 149, 158 (1970)).

6 The Supreme Court, when called upon to determine the validity of the Bail Reform Act,
 7 noted that the Act did not violate a defendant’s due process rights *only* because of the procedural
 8 safeguards which assured that the detention decision was accurate. *See Salerno*, 481 U.S. at
 9 751. The Court in *Salerno* reiterated that the Bail Reform Act conformed with the requirements
 10 of due process only because, “[i]n a *full-blown adversary hearing*, the Government must
 11 convince a neutral decisionmaker by clear and convincing evidence that no conditions of release
 12 can reasonably assure the safety of the community or any person.” *Salerno*, 481 U.S. at 750
 13 (emphasis added).

14 The Supreme Court has never passed upon the issue whether a bare proffer of a witness
 15 statement at a detention hearing would satisfy the Due Process Clause. However, various courts,
 16 including the Ninth Circuit, have held in analogous situations that such a proffer would not
 17 satisfy the due process. *See, e.g., Barnes v. Johnson*, 184 F.3d 451 (5th Cir. 1999) (Due Process
 18 Clause requires certain minimal safeguards to protect the limited liberty interest at stake in a
 19 parole revocation hearing, including “the right to confront and cross-examine adverse witnesses
 20 unless the hearing officer specifically finds good cause for not allowing confrontation”); *United*
 21 *States v. Simmons*, 812 F.2d 561 (9th Cir. 1987) (probationers and parolees have a right to
 22 confront and cross-examine adverse witnesses unless a judge finds good cause not to allow
 23 confrontation); *United States v. Martin*, 984 F.2d 308 (9th Cir. 1993) (the Due Process Clause
 24 requires a balancing test for parole and probation revocation hearings); *United States v. Kindred*,
 25 918 F.2d 485 (5th Cir. 1990) (same); *United States v. Bell*, 785 F.2d 640 (8th Cir. 1986) (same);
 26

1 *United States v. Penn*, 721 F.2d 762 (11th Cir. 1983) (same); *United States v. Myers*, 896 F.
2 Supp. 1029 (D. Or. 1995) (police reports insufficient; defendant's interest in cross-examination
3 outweighed the Government's interest in not producing a witness under the balancing test
4 required by the Due Process Clause); *Downie v. Klinck*, 759 F. Supp. 425 (N.D. Ill. 1991) (the
5 Due Process Clause requires some right to confrontation in parole revocation hearings).

6 The Ninth Circuit's decision in *United States v. Hall*, 419 F.3d 980 (9th Cir. 2005), and
7 the decision it rested upon, *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999), are highly
8 relevant. As noted above, the issue in *Hall* was whether the defendant in a supervised release
9 violation hearing had the right under the Sixth Amendment to confront adverse witnesses.
10 Although the court noted that he did not have such a right because the supervised release hearing
11 was not part of the criminal prosecution, the court nonetheless held that the defendant had a due
12 process right to confront some witnesses. *Id.* at 986. This ruling was based on the Ninth
13 Circuit's earlier decision in *Comito*.

14 The issue before the court in *Comito* was whether the introduction of hearsay evidence in
15 a supervised release violation hearing satisfied the defendant's due process right to confront
16 adverse witnesses. The facts of the case revealed that the defendant had been charged with
17 various supervised release violations, one of which was based upon statements allegedly made by
18 the defendant's ex-girlfriend to a probation officer that the defendant had engaged in fraudulent
19 behavior. *Id.* at 1168. At the district court's revocation hearing, the court allowed the
20 Government to introduce the fraud allegations through the testimony of the probation officer,
21 rather than the girlfriend herself. *Id.* The defendant objected, claiming that his right to confront
22 adverse witnesses was violated by the allowance of this hearsay testimony. *Id.*

23 The court agreed with the defendant and reversed the revocation order. The court first
24 concluded that a defendant had a limited due process right to confront adverse witnesses at a
25 supervised release revocation proceeding, just as a defendant had such a right in a probation and
26 parole revocation hearing. *Id.* at 1170. While the court acknowledged that the right to confront

1 adverse witnesses was not absolute, and could be circumvented by a showing by the Government
2 that there was good cause not to call a given witness, the question whether the Government
3 satisfied the good cause test in turn depended upon a balancing test. *Id.* at 1171-72. This
4 balancing test required the court to weigh the significance of the defendant's right to
5 confrontation against the Government's explanation as to why the witness could not, or was not,
6 called at the hearing. *Id.*

7 Applying that test to the facts before it, the court in *Comito* determined that the
8 statements of the defendant's girlfriend that the defendant had engaged in criminal activity were
9 crucial to the revocation determination. *Id.* at 1171. Moreover, because the statements by the
10 girlfriend to the probation officer were unsworn hearsay statements, they were, as the court put it,
11 "the least reliable type of hearsay." *Id.* Thus, the defendant's "interest in asserting his right to
12 confrontation [was] at its apogee." *Id.* Further, the court concluded that the Government had not
13 shown good cause for its failure to produce the ex-girlfriend at the hearing. Therefore, the court
14 determined that the defendant's constitutional rights had been violated. *Id.* at 1172.

15 The importance of *Comito* to the issue of what procedural rights a defendant possesses at
16 a bail hearing cannot be over-emphasized. *Comito* involved a supervised release violation
17 proceeding, where a defendant has already been convicted of a crime and thus had a limited
18 liberty interest. In contrast, bail hearings involve the freedom of presumptively innocent
19 individuals. Not only is a defendant's liberty interest stronger in bail proceedings, but the
20 standard of proof is higher; unlike a revocation proceeding, where the standard of proof is a
21 preponderance of evidence, the standard of proof at a detention hearing is clear and convincing
22 evidence, at least with respect to the dangerousness prong of the detention statute. Thus, it is
23 clear under the reasoning of *Comito* that a mere proffer about a given witness's testimony at a
24 detention hearing violates the Due Process Clause.

25 Mr. Kang again recognizes that there is a tension between *Winsor* and the *Comito* line of
26 cases with respect to the due process rights of individuals at detention hearings. He submits,

1 however, that the two cases can be easily reconciled through a ruling that although the due
2 process right to confront adverse witnesses is not absolute, that right may only be denied in
3 situations where the Government satisfies the balancing test set forth in *Comito*.

4 **IV. Even If The Production Of An Adverse Witness Is Discretionary, That Discretion**
5 **Should Be Exercised In Favor Of Ordering The Adverse Witnesses To Appear**

6 There are certainly cases which were decided before *Crawford*, *Hall* and *Comito* which
7 hold that the decision whether to require the production of witnesses by the Government at a
8 detention hearing is an issue to be left to the sound discretion of the Court. *See, e.g., United*
9 *States v. Gaviria*, 828 F.2d 667, 670 (11th Cir. 1987). As noted above, however, *Crawford*
10 changed the landscape with respect to confrontation rights and held that the right to
11 confrontation, at least with regard to witnesses who provide testimonial evidence, is absolute.
12 *Hall*, in turn, suggests that if the court has discretion whether to require the production of
13 witnesses, that discretion cannot and should not be exercised without a careful balancing of the
14 factors set forth in *Comito*. But assuming those cases do not create the rights that Mr. Kang
15 claims he has with respect to detention hearings, there is absolutely no issue but that this Court
16 could order the Government to produce witnesses in the exercise of its discretion. Mr. Kang
17 suggests that this Court should do so for a number of reasons.

18 Outside of the fact that this Court would not be forced to decide the constitutional issues
19 raised above if it decided to order the Government to produce any witness it plans to rely upon to
20 secure the defendant's detention, it needs little emphasis that this is a serious case, and any
21 doubts about what process the defendant should be due must be resolved in favor of Mr. Kang.
22 The Government bears the burden of proving that the defendant is a flight risk by a
23 preponderance of evidence and danger by clear and convincing evidence. Thus, the Government
24 must carry its burden through the use of witnesses and exhibits, and the defendant must be
25 afforded the right to challenge that evidence.

26 For all of these reasons, the Court must order the Government to produce witnesses

1 subject to cross examination at the detention hearing. This request is particularly directed at any
2 police witnesses and victims whose claims about the defendant will be referenced at the hearing.

3 **V. The Complaint Must Be Dismissed Because It Fails to State Probable Cause That**
4 **Mr. Kang Committed An Offense**

5 The complaint in this matter fails to state probable cause with regard to Mr. Kang and
6 must be dismissed. A fair reading of the complaint indicates that agents suspected co-defendant
7 Johnson of being involved in some bay area bank robberies, and began to follow him. Although
8 they saw Mr. Johnson allegedly “case” some banks, there is no claim that Mr. Kang was with
9 him during those activities.³ On May 30, 2007 the agents saw Mr. Johnson drive a Honda from
10 his girlfriend’s house to a parking lot, with a white SUV driving “in tandem” with the Honda
11 “during at least part of the drive.”⁴ At the parking lot, Johnson parked his car and went over to
12 the SUV with a bag in his hand. As the SUV began to drive away, Johnson apparently began to
13 change clothes, although the nature of Johnson’s activities is not explained.⁵ The SUV was
14 stopped, and Mr. Kang, who was driving the SUV, was arrested. Only after the stop was it
15 discovered that the bag carried by Johnson contained a gun, a mask, a cap and gloves. There is
16 no suggestion that the bag was opened in front of Mr. Kang.

17 In essence, agents saw Johnson get into Mr. Kang’s car and begin to change some of his
18 clothes. No other evidence suggests that Mr. Kang conspired with Johnson to rob the bank.

19 The complaint clearly fails to contain facts supporting a finding that there is probable
20 cause to believe that Mr. Kang conspired to commit bank robbery. The complaint must be
21 dismissed as a result.
22

23 ³ Nor are the activities described in enough detail for this Court to be able to
24 independently determine whether the agent’s assertions are valid.

25 ⁴ There is no clear explanation in the complaint what “part of the drive” means.

26 ⁵ It is unclear, for example, whether Johnson changed a hat he was wearing, a jacket, his
shoes, or a shirt and pants.

1 Dated: May 31, 2007

2
3 Respectfully submitted,

4
5 BARRY J. PORTMAN
6 Federal Public Defender

7 /S/

8 GEOFFREY A. HANSEN
9 Chief Assistant Federal Public Defender